No. 14073.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

R. H. OSBRINK, M. E. OSBRINK, and BERTON W. BEALS as Trustee, Co-partners, Doing Business Under the Firm Name and Style of R. H. OSBRINK MANUFACTURING COMPANY,

Respondents.

PETITION FOR REHEARING.

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Statement.

The Respondent herein respectfully petitions this Court for a rehearing on its opinion filed herein on December 20, 1954. Respondent submits that this Petition should be granted for the following reasons:

1. The Court holds that Derry Smith and Wally Watkins were not supervisors within the meaning of the Act, thereby disagreeing with the Board's finding to the contrary. However, the opinion apparently approves and affirms the five independent violations of the Act which were attributed solely to statements made by said Smith and Watkins and which could be affirmed only on the finding that said Smith and Watkins were supervisory employees. Thus, at the end of the Court's opinion it is

stated that all of the allegations of independent violations of Section 8(a)(1) "were proved".

2. The Court found that the independent violations of Section 8(a)(1) alleged in paragraph 4 of the Complaint were timely filed, particularly because said allegations relate to the same acts and are proved by the same evidence as the charges contained in the original charge which was timely filed. However, the only allegations of the original charge were that LeFlore and Plummer were discriminatorily discharged and the only finding of unfair labor practice under paragraph 4 of the Complaint which can be affirmed under the Court's opinion is that of Mr. Osbrink's talk to the employees which was found to contain a promise of benefit if they would reject unionization. We submit, therefore, that the finding is erroneous that the promise contained in Mr. Osbrink's talk relates to the same act or is proved by the same evidence as the discharge of LeFlore and Plummer.

3. The Board's Order herein would restrain Respondent from any and all violations of the Act. It is as broad as all of the substantive provisions of the Act itself. The only unfair labor practices which can be affirmed consistent with the Court's opinion filed herein are the discharge of LeFlore and Plummer and Mr. Osbrink's talk which is alleged to contain a promise of reward. This Court and the United States Supreme Court have consistently held that in such a case the order can restrain only the specific violations found and the record will not support a broad order restraining any and all subsequent violations of the Act.

In the event this Petition is denied, Respondent prays that it be considered as exceptions to the form of decree proposed by the Board.

I.

The Court's Finding That Smith and Watkins Were Not Supervisory Employees Within the Meaning of the Act Requires That All Unfair Labor Practices Predicated Upon Their Statements Be Overruled.

The Court stated at the end of its opinion that all of the allegations of paragraph 4 of the Complaint (which allegations are set forth in full on page 7 of the Court's opinion) were timely filed, and were proved. We submit that this statement is erroneous since the Court had already found that no unfair labor practices could be predicated upon statements of Smith and Watkins since the Board's finding that they were supervisorial employees was without support in the record. The fact that the Court's statement is in error is clearly indicated by considering the specific unfair labor practices which the Board found and by then comparing them to the allegations of paragraph 4 of the Complaint.

In addition to finding that the discharge of LeFlore and Plummer violated Sections 8(a)(3) and 8(a)(1) of the Act, the following are all of the unfair labor practices which the Board found and all were found to violate only Section 8(a)(1):

(1) A statement by Derry Smith that Respondent would close the plant if the Union won the election [R. 35-36].

(2) A statement by Derry Smith to employee Goynes that Respondent would withdraw certain privileges if the Union won the election [R. 36].

(3) A statement of Derry Smith to said Goynes that the latter was slated for discharge for Union activities [R. 47].

(4) A statement by Derry Smith to the effect that LeFlore would not be rehired since he had been seen passing out Union pamphlets [R. 47].

(5) A statement by Derry Smith and Wally Watkins to the effect that LeFlore's discharge was for Union activity [R. 47].

(6) The speech of Mr. Osbrink to the employees on January 24, 1952, which was found to contain a promise of benefit if employees would reject unionization [R. 30].

Thus, it is manifest that the first five findings of unfair labor practice listed above were predicated solely upon conduct and statements of Smith and Watkins, and said findings of unfair labor practice cannot stand in view of the Court's finding that Smith and Watkins did not have supervisorial or managerial status. The six findings of unfair labor practice listed above are the only findings made pursuant to paragraph 4 of the Complaint. Therefore, under the Court's findings, the allegations of paragraph 4 of the Complaint were not proved except as to subparagraph (d) thereof (discharging LeFlore and Plummer because of their Union activity) and subparagraph (f) thereof (Mr. Osbrink's talk which was found to contain a promise of benefit if employees would reject unionization). Subparagraph (a) of paragraph 4 of the Complaint was specifically rejected by the Board itself [R. 36-37]. Subparagraph (g) of paragraph 4 of the Complaint was effectively removed from the proceeding at the hearing before the Trial Examiner when he stated [R. 126] that such "catchall phrases" were insufficient and that he would find only on the basis of specific allegations of unfair labor practices [R. 122-126].

Subparagraphs (b), (c) and (e) of paragraph 4 of the Complaint, in the light of the specific findings of unfair labor practice made by the Board, can be related only to those findings predicated upon statements by Smith and Watkins and, therefore, cannot be held to have been proved since those individuals were not supervisors.

II.

The Charge With Respect to Mr. Osbrink's Talk to Employees Is Barred by Section 10(b) of the Act Since It Is Not Related to the Discharges Alleged in the Amended Charge.

We recognize that subparagraph (d) of paragraph 4 of the Complaint (discharge of employees for Union activity) is in no way affected by the six months limit of Section 10(b) of the Act since the charge which admittedly was timely filed expressly alleged discharge of employees as being in violation of both Section 8(a)(3) and Section 8(a)(1) of the Act. For the reasons stated under title I above, the only remaining allegation of paragraph 4 of the Complaint which is any longer involved is subparagraph (f) which was found to have been proved by means of Mr. Osbrink's talk to employees the day preceding the election and upon the finding that such talk constituted a promise of reward and benefit to employees by way of monetary contribution from the employer if the employees would remain unorganized. Subparagraph (f) of paragraph 4, in the light of that finding, is the only allegation which now need be considered and judged under the six months rule of Section 10(b) of the Act.

It must first be recognized, and the Court's opinion does so recognize, that Mr. Osbrink's talk as first al-

leged in the Complaint, was never alleged in any previous unfair labor practice charge or amended charge, and the issuance of the Complaint alleging that matter was more than six months after the making of the talk. The Court's opinion proceeds on the ground that the new matter in order to avoid the six months limit of Section 10(b) must be related to the allegations of the previously timely filed charge. The Court concludes after consideration of authority setting forth that rule that in the case at hand the enlarged charge (which consists now only of Mr. Osbrink's talk to employees) was timely as it "must stand or fall upon the evidence as to the violation originally charged." The Court concluded with the statement, "In fact, the original charges and the charge enlarged by the allegation in the complaint relate to the same acts. In these circumstances, we think the relation back theory is applicable by its general application and operation of the proviso to §10(b) of the Act."

We submit that the application of the rule stated by the Court to the facts here will not support the conclusion reached. We think this is clearly indicated by an examination of just exactly what was alleged in the charge and exactly what was alleged in the new allegations contained for the first time in the Complaint filed more than six months after the occurrence of the acts. There is no argument but that the charge and the amended charge alleged a violation of the Act only in the discharge of specifically named employees. Absolutely nothing else was alleged. This timely filed charge found its way into

the Complaint by the allegations in paragraphs 5 and 4(d) that Respondent had violated the Act in the discharge of John LeFlore on January 15, 1952, and Archie Plummer on February 29, 1952. To that extent the allegations of the Complaint are timely, but those allegations exhausted the limits of the charge. Paragraph 4(f) of the Complaint alleged a violation in the offering of benefits and rewards to employees if they would withhold their support to the Union, and this was found to have been proved by the talk by Mr. Osbrink on January 24, 1952 [R. 30]. The fact that the evidence which proves the discharge is in no way related to or proves the making of Mr. Osbrink's talk or any question as to its legality is established by the fact that the Trial Examiner's report, the Board's decision, and the Court's decision in no way relies upon the evidence of either of those discharges in considering the validity of Mr. Osbrink's talk to employees. It is equally clear from examining the nature of the discharges and the nature of the talk that the two are not related by way of evidence to prove either. The evidence with respect to the discharges consisted of an examination of the work history and efficiency or lack of it of the individuals involved, their absentee record and a comparison of their performance to the performance of other employees who had not been discharged. None of that was involved under paragraph 4(f) of the Complaint, and the evidence considered by the Board in finding that Mr. Osbrink's talk violated the Act was merely the talk itself. Thus,

we respectfully submit that subparagraph (f) and the related finding of unfair labor practice cannot be held to be proved by the same evidence as was used to prove the violations contained in the original charge.

Nor can it be said with any greater force or logic that the allegations of paragraph 4(f) of the Complaint "relate to the same act" as were alleged in the timely filed charge. The discharge of an employee bears no relation to a promise of benefit made at a different time in the circumstances presented here. The fact that both acts are violations of the Act, and that they were committed by the same employer is not sufficient to establish the required degree of relationship. If it were sufficient, then any unfair labor practices committed by the same employer within six months of the filing of any charge would be held to be related. If that were the case, then any charge would open up all matters within six months preceding its filing and the statute of limitations expressed in Section 10(b) would be of no practical effect. In that connection we wish to point out the recent holding of the National Labor Relations Board in *Knickerbocker Mfg. Co.* (Sept. 9, 1954), 109 N. L. R. B. No. 169, 34 LRRM 1551. That case overruled the previous decision of *Cathey Lumber Company* (Sept. 28, 1949), 86 N. L. R. B. 157, which the Board relied upon in its decision here [R. 78, 103]. In overruling that case, the Board in *Knickerbocker Mfg. Co.* had before it, in part, the question of whether a discriminatory refusal to reinstate an employee was sufficiently related to a charge

of discriminatory discharge of the same employee for the purpose of applying Section 10(b) of the Act, and in holding it was not, stated:

> " 'Assuming, however, that the March requests were for employment generally, we would find that they were barred by Section 10(b) of the Act. *We think it is clear that the amended charge raised a new and separate cause of action which must independently satisfy the limitations of Section 10(b).* This view differs materially with the prior holdings of this Board in its Cathey and subsequent decisions that the filing of an original charge tolls the running of the 10(b) limitations so as to permit adjudication of any and all subsequent unfair labor practices. Such a broad interpretation of Section 10(b) has never, save for one possible exception, been adopted by the courts and is indeed contrary to the weight of judicial precedent. * * *' " (Emphasis added.)
>
> *Knickerbocker Mfg. Co.,* 109 N. L. R. B. No. 169, 34 LRRM 1551, 1552-1553.

Certainly it would seem that the degree of relationship which was held insufficient in the *Knickerbocker Mfg. Co.* case is much closer than exists here between the allegation in the charge with respect to the discharge of LeFlore and Plummer and the talk made by Mr. Osbrink to employees.

We respectfully submit, therefore, that paragraph 4(f) of the Complaint was not timely filed and is barred by Section 10(b) of the Act since it was first alleged more than six months after the events complained of and is not sufficiently related to the allegations contained in the previously filed charge.

III.

The Order Which the Board Seeks Here to Enforce Is Too Broad in Form Even if All of the Unfair Labor Practices Alleged Are Well Founded.

The Order which the Board seeks to enforce is of the broadest type which it could frame. The Order is set forth beginning on page 80 of the record. Paragraph 1(d) thereof is a blanket injunction which is framed so as to restrain any and all acts by Respondent which would in any way be a violation of any provision of the Act. The courts have consistently held that such an Order may be entered only in extreme cases. The unfair labor practices which are alleged here are indeed small compared to those involved in the cases which have approved an order of the type which the Board seeks here to enforce.

The General Counsel of the Board has submitted to the Court its proposed decree to be entered in this matter, and the form is identical with that attached to the Board's decision. This form of proposed decree in paragraph 1(b) orders Respondent to cease and desist from threatening that union representation would result in closing of the plant and in loss of benefits. Clearly, that provision must be deleted since the only finding that such conduct occurred was predicated upon the finding that Derry Smith was a supervisory employee. The Court has expressly disagreed with that finding and the proposed decree is inconsistent with the Court's opinion. Thus, the Court's decision herein requires the deletion of paragraph 1(b) from the Order and the deletion of paragraph 1(d) would be required even if the Court had affirmed every finding of unfair labor practice made by the Board and is particularly required in view of the fact that the Court's decision re-

quires the reversal of five independent findings of unfair labor practice.

As we understand the Court's decision, the only findings of unfair labor practice which are affirmed is the discharge of LeFlore and Plummer and that relating to the talk of Mr. Osbrink to the employees the day before the election. These findings consist of two cases of violation of Section 8(a)(3) and one independent violation of Section 8(a)(1). In such circumstances the provisions of Section 1(d) cannot properly be sustained. It should be recognized that there are five types of employer unfair labor practices. Section 8(a)(2) deals with assistance and domination of labor unions which is in no way involved in this proceeding; Section 8(a)(4) deals with discrimination against employees for giving testimony under the Act and is in no way involved in this proceeding; Section 8(a)(5) requires an employer to bargain in good faith with a union which has been chosen as the employees' representative and that also is not involved in this proceeding. Section 1(d) of the Board's Order would, therefore, make it a violation of the Order for the Respondent to do any of those things and it is obvious that Respondent has never done them at all nor is there the slightest implication of a threat to do so at any time. To enforce this Order would mean that Respondent would be enjoined from refusing to bargain in good faith with the employees' representative at a time when the employees have never designated a representative. This Court and the Supreme Court have repeatedly held that where the only violations are of Sections 8(a)(3) and (1) of the Act the order cannot enjoin violations of other sections of the Act, and, equally, when the only violation is of

Sections 8(a)(5) and (1) of the Act the order cannot enjoin violations of Section 8(a)(3) of the Act.

Thus, in *N. L. R. B. v. Jay Co., Inc.* (C. A. 9, July 2, 1954), 34 LRRM 2589 (official citation not available) the Board affirmed findings of violation of Sections 8(a)(3) and (1) of the Act which consisted of discharging an employee because of his conduct in disbanding an independent labor organization. Violations of Section 8(a)(2) were also present upon a finding that the employer had illegally assisted the independent labor union. The Board's order which it sought to enforce contained a provision similar to Section 1(d) of the Order involved in the instant proceeding and this court held that the order was too broad to be enforced in that form in the light of the character of the violations which had been found. The court stated:

> "In one respect we consider the Board's order to be too broad. The evidence does not show extensive anti-union activities or activities of an aggravated character evincing an attitude of general opposition to rights of employees. A blanket restraint is unwarranted. N. L. R. B. v. Nesen, 211 F. 2d 559, 33 LRRM 2773. Subsection (e) of Paragraph 1 of the Board's order will be eliminated."
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> *N. L. R. B. v. Jay Co., Inc.,* 34 LRRM 2589, 2592.

Similarly in *N. L. R. B. v. Cowles Pub. Co.* (C. A. 9, June 28, 1954), 214 F. 2d 708, this Court affirmed the Board's finding that the employer had violated the Act in discharging sixteen employees for union and concerted activity. The Board's order included a provision similar to Section 1(d) of the Order before the Court in this case and again the Court refused to enforce that provision of

the order since it was unjustifiably broad (214 F. 2d 711).

In *N. L. R. B. v. Express Pub. Co.* (1941), 312 U. S. 426, 85 L. Ed. 930, the unfair labor practice finding consisted of violation of Sections 8(5) and (1) in refusal to bargain in good faith with the bargaining agent. The Board sought to enforce an order prohibiting any and all violations of the Act, and the Supreme Court held that such an order was not justified. The Court stated in part:

> "It is obvious that the order of the Board which when judicially confirmed, the courts may be called on to enforce by contempt proceedings, must, like the injunction order of a court, state with reasonable specificity the acts which the respondent is to do or refrain from doing. It would seem equally clear that the authority conferred on the Board to restrain the practice which it has found the employer to have committed is not an authority to restrain generally all other unlawful practices which it has neither found to have been pursued nor persuasively to be related to the proven unlawful conduct.
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> * * * * * * * *
>
> "Refusal to bargain may be, as we think it was here, wholly unrelated to 'discrimination in regard to the hire or tenure of employment on any term or condition of employment to encourage or discourage membership in any labor organization,' all of which are unfair labor practices as defined by §8(3)."
>
> *N. L. R. B. v. Express Pub. Co.,* 312 U. S. 426, 85 L. Ed. 930, 936.

We submit that it is equally clear that a finding of Section 8(a)(3) is "wholly unrelated" to a refusal to

bargain with the bargaining agent as required by Section 8(a)(5) of the Act.

We submit, therefore, that the proposed decree submitted to the Court by the General Counsel is unjustifiably broad and that paragraphs 1(b) and (d) should be deleted therefrom with corresponding deletions in the notice which Respondent is required to post.

Conclusion.

Respondent respectfully prays, therefore, that the Court grant this Petition for Rehearing and that upon the rehearing of this cause the Court's opinion and decree be modified as requested herein.

Dated: January 17, 1955.

Respectfully submitted,

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By WILLIAM F. SPALDING,

Attorneys for Respondents.

Certificate of Counsel.

The undersigned hereby certifies that he has prepared this Petition for Rehearing and that the grounds therein stated are in his opinion well founded and that this Petition is not filed for reasons of delay.

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